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9 UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF WASHINGTON

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.

14 DALE GORDON BLACK,

15 Defendant.

No. 4:18-CR-06029-EFS-1

United States Response to
Defendant's Sentencing
Memorandum

16
17 Plaintiff, United States of America, by and through Joseph H. Harrington,
18 United States Attorney for the Eastern District of Washington, and Alison L.
19 Gregoire, Assistant United States Attorney for the Eastern District of
20 Washington, submits the following response to Defendant's sentencing
21 memorandum (ECF No. 65).

22 1. First time offender. ECF No. 65 at 7.

23 Defendant's statement is correct insofar as he lacks criminal history.
24 However, his lack of criminal history was already taken into account in calculating
25 his sentencing guideline range.
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27
28

1 While this is Defendant's first conviction; it is far from his first offense.
2 Defendant is a "first time offender" only in the sense that he was not caught on the
3 previous occasions when he abused numerous children for some fourteen years.
4 More importantly, however, his criminal history is not unique in a sense that it
5 justifies imposing a sentence far different from the heartland of sentences for
6 similarly situated defendants. Indeed, were Defendant to have a prior sex offense,
7 he would suffer another at least ten years of mandatory incarceration, pursuant to
8 the statute of conviction and, assuming he was a registering sex offender, could
9 also serve another ten years consecutive for the violation of 18 U.S.C. § 2260A. 18
10 U.S.C. § 2251(e) ("but if such person has one prior conviction under this chapter . .
11 . imprisoned for not less than 25 nor more than 50 years"); 18 U.S.C. § 2260A
12 ("Whoever, being required by Federal or other law to register as a sex offender,
13 commits a felony offense involving a minor under section 1201, 1466A, 1470,
14 1591, 2241, 2242, 2243, 2244, 2245, 2251, 2251A, 2260, 2421, 2422, 2423, or
15 2425, shall be sentenced to a term of imprisonment of 10 years in addition to the
16 imprisonment imposed for the offense under that provision"). Of note, Defendant
17 also argues the sought sentence is more severe than "other similar defendants who
18 physically abused children hands-on." ECF No. 65 at 21. The United States notes
19 a person who sexually abuses children under the age of twelve and is prosecuted
20 federally under 18 U.S.C. § 2241(c) is sentenced to "not less than 30 years or for
21 life."
22

23 2. Since his initial contact with case agents, Mr. Black has been
24 cooperative with law enforcement and the judicial system as evidenced by
25 his immediate admissions and timely guilty plea. ECF No. 65 at 7.

26 As a point of clarification, Defendant did not say anything to law
27 enforcement about what he had done or who he had done it to. The United States
28

1 fully agrees he was not obstructionist, but to the extent Defendant argues he made
2 "immediate admissions," such was not the case. The government agrees Defendant
3 pled guilty promptly and deserves full credit for acceptance of responsibility in this
4 case, but determining the scope of the abuse, identifying and locating the victims
5 was left to law enforcement in this case.

6 3. "Could incarcerate him for his remaining years." ECF NO. 65 at 7.

7 Defendant notes he faces a 30 year sentence, which he argues would be
8 unjust given his age, and he notes the same "could incarcerate him for his
9 remaining years." ECF NO. 65 at 7. The government initially notes, both the
10 statutory maximum sentence and the applicable guideline range are 90 years. ECF
11 No. 53 at 19. The government additionally notes the Fed. R. Crim. P. 11(c)(1)(C)
12 plea agreement detailed a range up to 35 years imprisonment, which is what the
13 government is seeking in this case. ECF No. 53 at 4.

14 Insofar as Defendant argues he should receive less time because he is 62
15 years old, the Ninth Circuit has rejected such an argument. *United States v. Seljan*,
16 547 F.3d 993, 1007 (9th Cir. 2008) (20-year sentence for 87 year old was
17 reasonable though it was tantamount to life imprisonment for attempted travel with
18 intent to engage in illicit conduct with a minor). Defendant's suggested sentence of
19 15 years is insufficient. Fifteen 15 years is the mandatory minimum for
20 Defendant's offense of conviction for the least of the conduct covered by the
21 offense. 18 U.S.C. § 2251. In other words, a person who engages in remote
22 production, via the internet, with a seventeen year old, would be subject to the
23 fifteen year mandatory minimum. Defendant's three offenses, involving multiple
24 victims over more than a decade of time, with whom he had special trust
25 relationships, certainly involves more than the minimum misconduct justifying the
26 minimum sentence.
27

1 Defendants have been sentenced to far more significant sentences, even
2 upward departures from the guidelines, in production cases. *United States v.*
3 *Sarras*, 575 F.3d 1191, 1220 (11th Cir. 2009) (noting that “[c]hild sex crimes are
4 among the most egregious and despicable of societal and criminal offenses” and
5 affirming 1,200-month sentence); *United States v. Johnson*, 451 F.3d 1239, 1244
6 (11th Cir.2006) (upholding as reasonable a 140-year sentence for abusing and
7 photographing three boys between the ages of 8 and 16 based on consecutive
8 statutory maximums under 18 U.S.C. § 2251(e) and § 2252A(b)(1)); *United States*
9 *v. Kapordelis*, 569 F.3d 1291, 1318-19 (11th Cir. 2009) (upholding as reasonable a
10 420-month sentence, which represented an upward variance from the 262-327-
11 month advisory guidelines range and included 240-month sentences on counts
12 charging production of child pornography under § 2251(a) and 180-month
13 consecutive sentences on counts charging receipt of child pornography under §
14 2252A(a)(2)(A)); *United States v. Huffstatler*, 561 F.3d 694, 698 (7th Cir.2009)
15 (upholding as reasonable an above-guidelines, 450-month sentence for producing
16 pornographic pictures of a 14-year-old boy); *United States v. Raplinger*, 555 F.3d
17 687, 695 (8th Cir. 2009) (upholding as reasonable a 457-month sentence for
18 photographing and having sexual intercourse with a 15-year-old girl); *United*
19 *States v. Betcher*, 534 F.3d 820, 827-28 (8th Cir. 2008) (upholding as reasonable a
20 750-year sentence for a first-time offender who had taken pornographic pictures of
21 five 8 to 11-year-old girls, including two of his granddaughters).

22
23 4. Defendant's recidivism likelihood is low per the Static 99R. ECF No.
24 65 at 8.

25 First, it would seem Defendant's Static 99 was scored incorrectly as it
26 indicates there were no unrelated victims. ECF No. 65-2. The United States has
27 no reason to believe Defendant was related to *any* of his victims, let alone that they

1 were in his immediate family. Second, and more importantly, the test is driven off
2 of prior convictions. The ten risk factors in the Static 99 are: age of offender;
3 stability of relationships; whether most recent conviction is for non-sexual
4 violence; any prior conviction for non-sexual violence; number of sexual offense
5 convictions or charges prior to most recent offense; has individual been sentenced
6 on more than four prior occasions; convictions for non-contact sex offenses; any
7 unrelated victims; any stranger victims; and any male victims. The "index offense"
8 does not count, even in cases such as the instant case where the "index offense" is a
9 composite of several cases, over several years, involving several victims. The test
10 is also not intended for child pornography offenders, and for this reason, neither
11 test is endorsed as a tool for predicting likelihood of any kind of recidivism among
12 the child pornography offenders. The tests are intended to assess the risk of hands-
13 on sex offenses by hands-on offenders. Says nothing of likelihood of recidivism
14 for child pornography offenses. Thus, the test does not speak to Defendant's
15 likelihood to recidivate through a child pornography offense that is not "hands-on."

16
17 5. While Mr. Black is not trying to deflect responsibility, it is obvious
18 that his pornography addiction over the years served as a pathway and
19 precursor to his hands on sexual offending. It is plausible to assume Mr.
20 Black's sexual offending could have been diverted if his addiction to
21 pornography had been properly treated at an earlier stage. ECF No. 65 at 13.

22 The United States appreciates how carefully worded the defense claim is and
23 understands the defense is attempting to cautiously walk a very fine line in
24 advocating for Defendant. That said if Defendant, a well off, college educated
25 Hanford engineer with a near idyllic childhood did not have the means and ability
26 to secure treatment on his own, who would? What Defendant seems to be arguing
27 is that he should have been caught earlier and prosecuted sooner such that he
28 would have been made to obtain treatment. Respectfully, Defendant utilized his

1 substantial knowledge of computers and tech savvy to avoid being caught.
2 Defendant sought out particularly vulnerable victims to avoid being caught. The
3 government is not at fault for Defendant's continued abuse of children for over a
4 decade, because he was not made to obtain treatment at an earlier stage. Defendant
5 is at fault; Defendant is responsible.

6 6. Defendant's social awkwardness and his sexual exploitation
7 conviction make him vulnerable to abuse in prison, which may warrant a
8 downward departure. ECF No. 65 at 15.

9 As was noted by the Ninth Circuit, the concerns of Defendant are equally
10 present for all similarly situated sex offenders who face prison sentences; his case
11 is not unusual. *United States v. Stoterau*, 524 F.3d 988, 1013 (9th Cir. 2008)
12 (citing *United States v. Kapitzke*, 130 F.3d 820, 822 (8th Cir.1997) (reversing a
13 downward departure for susceptibility to abuse in prison that was based on the
14 defendant's status as a child pornographer); *see also United States v. Parish*, 308
15 F.3d 1025, 1032 (9th Cir. 2002) (upholding a departure where the district court did
16 not rely solely on the defendant's "mere membership in a class of offenders")). As
17 noted by the Ninth Circuit in *Stoterau*, prison officials must "take reasonable
18 measures to guarantee the safety of the inmates" and to "protect prisoners from
19 violence at the hands of other prisoners." *Id.* (quoting *Farmer v. Brennan*, 511 U.S.
20 825, 832–33 (1994)).

21 7. Empirical data does not support child pornography guidelines. ECF
22 No. 65 at 6.

23 "The child pornography Guidelines are, to a large extent, not the result of
24 the Commission's 'exercise of its characteristic institutional role,' which requires
25 that it base its determinations on 'empirical data and national experience,' but of
26 frequent mandatory minimum legislation and specific congressional directives to
27

1 the Commission to amend the Guidelines.” *United States v. Henderson*, 649 F.3d
2 955, 962-63 (9th Cir. 2011). Therefore that district courts have discretion to
3 deviate from the Guidelines based on policy disagreements with § 2G2.2. *Id.* at
4 964. However, as *Henderson* also noted, “district courts are not obligated to vary
5 from the child pornography Guidelines on policy grounds if they do not have, in
6 fact, a policy disagreement with them.” *Id.* (“application of § 2G2.2 will always
7 result in an unreasonable sentence”). “[S]entencing courts must continue to
8 consider the applicable Guidelines range as the starting point and the initial
9 benchmark.” *Id.* (quotation omitted). If the Court believes the guidelines produce
10 an appropriate sentence, it should not “second-guess [that] decisio[n] . . . simply
11 because the particular Guideline is not empirically-based.” *United States v.*
12 *Mondragon-- Santiago*, 564 F.3d 357, 367 (5th Cir. 2009); *see also United States*
13 *v. Coleman*, 635 F.3d 380, 383 (8th Cir. 2011) (“argument that the child
14 pornography Guidelines are unsupported by empirical evidence is not an issue of
15 substantive reasonableness and not properly made to this court”).

16 All of that said, in this case, the United States is not seeking a Guideline
17 sentence. In fact, the United States is seeking a 55 year downward variance from
18 90 years down to 35 years.

19 8. Restitution

20 The series victims seeking restitution are SurferHair (4 images) RapJerseys
21 (3 images) and SpongB (6 images). “Series” restitution requests are often resolved
22 in the Eastern District of Washington in the amount of \$1,000 per image. Counsel
23 for SurferHair and RapJerseys has indicated SurferHair and RapJerseys will accept
24 \$1,000 per image for a total award of \$4,000 and \$3,000 respectively. Undersigned
25 counsel has attempted to contact SpongB’s attorney(s) several times without
26 success in an attempt to ascertain the basis for SpongB’s request for \$58, 415 in
27

1 restitution. The United States believes \$1,000 an image for a total \$6,000 award to
2 SpongB would be appropriate in this case.

3 Defendant contends that he is “unaware of any additional restitution owed to
4 Victim A” beyond the civil settlement entered into between Defendant and Victim
5 A in January 2019. ECF No. 65 at 30. It is the Government’s understanding that
6 the restitution sought by Victim A concerns costs incurred as result of this criminal
7 matter, which are separate and apart from the civil settlement and should be
8 covered by a restitution order providing for the restitution sought by Victim A in
9 the amount of \$3,150.

10 Victim B and Victim C still have restitution claims outstanding. They were
11 contacted again on July 3, 2019. Both victims are currently undergoing counseling,
12 as are members of their families. Victim B and Victim C and their families are
13 gathering restitution and may need additional time to finalize their requests. If the
14 restitution information from these victims is not received prior to sentencing, the
15 United States intends to move the Court to set out the date for the restitution
16 hearing as to only these victims. *See* 18 U.S.C. § 3664(d)(5) (“If the victims’ losses
17 are not ascertainable by the date that is 10 days prior to sentencing, the attorney for
18 the Government or probation officer shall inform the court, and the court shall set a
19 date for the final determination of the victim's losses, not to exceed 90 days after
20 sentencing.”). The United States would intend to proceed with sentencing,
21 forfeiture, fines, and the rest of the restitution claims.

22 9. Fine

23 Defendant acknowledges that a fine is mandatory in this matter. ECF No. 65
24 at 30. Defendant’s proposed fine of \$150,000, however, fails to reflect the
25 seriousness of the crime or provide just punishment. U.S.S.G. § 5E1.2(d).
26 Moreover, a fine at the lowest end of the Sentencing Guidelines would not be
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1 punitive, nor would it provide adequate deterrence as the Defendant would be left
2 with nearly \$1 million. *Id.*

3 As noted in the Government's sentencing memorandum, all of the factors of
4 18 U.S.C. § 3572 and U.S.S.G. § 5E1.2(d) favor the imposition of a substantial
5 fine, including Defendant's ability to pay, the absence of any dependents, the lack
6 of any adverse effect on restitution, the expected costs to the government for
7 imprisonment, the seriousness of the offense conduct, the life-altering harm to the
8 victims, the need for deterrence, and the need for just punishment.

9 Defendant argues that equitable considerations favor the lowest possible fine
10 because "[i]f the Court were to order \$750,000 in fines, Mr. Black would be in
11 peril of being at near poverty level income shortly after he would be released from
12 prison." ECF No. 65 at 32. Putting aside whether the Court should look at the
13 Defendant's gross assets value or take into account unrealized, potential taxes and
14 fees when assessing the Defendant's ability to pay, Defendant himself admits that
15 "if the Court imposed a fine of \$750,000, Mr. Black would be left with
16 approximately \$224,771 in assets." *Id.* Retaining nearly a quarter of a million
17 dollars in investment assets is not "near poverty level income" or "perilously close
18 to the poverty line." *Id.* 32-33. Further, Defendant incorrectly uses median
19 household income to conclude that his yearly net pension income of \$26,400
20 places him "near poverty level income." The United States Department of Health
21 and Human Service poverty guideline for a single individual with no dependents in
22 2019 is \$12,490. *See* U.S. Federal Poverty Guidelines for 2019, *available at*
23 <https://aspe.hhs.gov/poverty-guidelines>. Defendant's pension income alone is more
24 than double the poverty level income level. In addition, Defendant would receive
25 unaccounted for Social Security benefits since he is at retirement age. Plus, using
26 Defendant's own numbers, he would have nearly a quarter of a million dollars in
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1 retirement savings. Accordingly, none of the equitable considerations or other
2 factors support the fine requested by Defendant.

3 Finally, the forfeiture of the Defendant's vehicle and \$186,500 cash-in-lieu
4 of forfeiture of his residence, along with the \$325,000 civil settlement with Victim
5 A, should not be considered to be funds Defendant has already had to pay in this
6 case. ECF No. 65 at 32, 34 (including the amounts of the forfeited assets as money
7 Defendant "has or will pay based on this case."). Forfeiture is distinct from
8 restitution and other monetary penalties, including fines, imposed by the court.
9 *United States v. Newman*, 659 F.3d 1235, 1240-41 (9th Cir. 2011). These assets are
10 to be forfeited because they facilitated the offense conduct. The forfeiture of these
11 assets is not another monetary penalty or obligation that should be taken into
12 account when determining whether to impose a fine, except to the extent the
13 forfeiture affects the Defendant's ability to pay, which it does not since the
14 Defendant's reported assets do not include the forfeited assets. ECF No. 59 at 19-
15 20; ECF No. 53 at 15.

16 Respectfully submitted this 9th day of July 2019.

17
18 Joseph H. Harrington
19 United States Attorney

20 s/ Alison L. Gregoire
21 Alison L. Gregoire
22 Assistant United States Attorney
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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2019 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Scott W. Johnson, scott@johnsonorr.com

s/Alison L. Gregoire

Alison L. Gregoire

Assistant United States Attorney